No. 79-886

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President, Secretary and General Counsel,

Petitioners,

—v.—

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* FOR THE COMMITTEE ON FEDERAL COURTS AND THE COMMITTEE ON CORPORATE LAW DEPARTMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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The Committee on Federal Courts and the Committee on Corporate Law Department of the Association of the Bar of the City of New York (the "Committees"), *amici curiae* by consent of the parties, respectfully submit this brief to address two issues of signal importance to the bar and to the administration of justice: (i) the scope of the attorney-client privilege as it

relates to communications between lawyers and their corporate clients; and (ii) the applicability of the work product doctrine in administrative summons proceedings such as that at bar. We urge the Court (i) to reject the "control group" test of the attorney-client privilege adopted below and instead to apply the "subject matter" test that has been accepted by two other United States Courts of Appeals and by many other courts; and (ii) to hold that the work product privilege is available in this summons proceeding just as in any other lawsuit or proceeding.

OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals is reported at 600 F.2d 1223 (6th Cir. 1979). The opinion of the United States Magistrate is unofficially reported at 41 A.F.T.R.2d 78-796 and 78-1 U.S.T.C. ¶ 9277. Neither the order of the District Court adopting the Magistrate's opinion nor the order of the District Court enforcing the summons is officially reported.

A petition for certiorari was filed within ninety days of the denial by the Court of Appeals of a petition for reconsideration. The petition for certiorari was granted on March 17, 1980. 100 S. Ct. 1310. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation when (a) the employee, although himself perhaps not a member of the corporation's "control group," makes the communication at the direction of his superiors in the

corporation, (b) the subject of the communication is a matter about which the attorney's advice has been sought by the corporation, and (c) the communication relates to the performance by the employee of the duties of his employment.

2. Whether documents that would be protected against disclosure by the work product doctrine if sought by judicial process are similarly protected under that doctrine when sought by an administrative summons.

STATEMENT OF THE CASE

The Facts

In January 1976, outside auditors for The Upjohn Company ("Upjohn" or the "Company"), in the course of auditing one of Upjohn's foreign subsidiaries, discovered that the foreign subsidiary was making payments to foreign government employees and others in order to secure government business. The auditors reported these questionable payments to Gerard Thomas, Upjohn's general counsel, and to other management officials. After consultation with Upjohn's board chairman and outside counsel—and long before any governmental investigation had begun—Mr. Thomas and Upjohn's outside counsel conducted an internal investigation to determine the nature and extent of the questionable payments. 41 A.F.T.R.2d at 78-798.

The District Court, by adopting the Magistrate's report, found that the purpose of the investigation was to enable Mr. Thomas and outside counsel "to be in a position to give legal advice to the Company. . . ." *Id.* *See* 78-1 U.S.T.C. ¶ 9437.

In their investigation, Mr. Thomas and the outside attorneys sent a questionnaire to the managers of Upjohn's 53 foreign affiliates that elicited information about questionable payments. The questionnaire responses have been treated as confidential. In addition, counsel interviewed all of the people to whom the questionnaire was sent, as well as some other employees. Counsel's notes of those interviews contained, among other things, counsel's thoughts concerning the importance of certain subjects, how those subjects related to other subjects, and what additional information counsel thought important to obtain. 41 A.F.T.R.2d at 78-798 to 78-799.

The Company's attorneys then recommended that Upjohn make a preliminary report to the Securities and Exchange Commission ("SEC") regarding the questionable payments. The report was made promptly, both to the SEC and to the Internal Revenue Service ("IRS"). Later, after additional information had been obtained, Upjohn made more complete reports to the SEC and to the IRS. *Id.*

Prior to the filing of Upjohn's initial report to the SEC, the IRS had been auditing the Company's 1972 and 1973 income tax returns. The audit had almost been concluded when the IRS received a copy of the initial report to the SEC. In consequence, the audit was not closed and the matter was referred to the IRS's Intelligence Division, which undertook an investigation for the years 1972 through 1974. 41 A.F.T.R.2d at 78-799.

Upjohn cooperated with this investigation. It advised the IRS of the nature and extent of its internal investigation, and it provided the IRS with copies of

the documents—invoices, vouchers, checks, and other materials—that Upjohn had discovered during its own investigation. Upjohn also provided the IRS with a list of the persons whom Upjohn's counsel had interviewed, and Upjohn agreed to make available to the IRS all the persons who were interviewed by Upjohn's counsel and who still were employed by the Company. Upjohn refused, however, to give the IRS the notes of counsel's interviews and the responses to counsel's questionnaire. Also, Upjohn declined voluntarily to permit questions as to matters that did not affect its consolidated federal income tax returns. 41 A.F.T.R.2d at 78-799.

The IRS interviewed some of the Upjohn employees and then issued a summons to Upjohn pursuant to 26 U.S.C. § 7602.[1] 41 A.F.T.R.2d at 78-797, 78-799. The

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1 26 U.S.C. § 7602 provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

summons sought production, *inter alia*, of the notes taken by Upjohn's counsel and the responses to the questionnaire circulated by Upjohn's general counsel. Upjohn refused to produce the documents on the ground that they were protected against discovery by the attorney-client privilege and by the work product doctrine.

Proceedings Below

The IRS thereupon instituted a proceeding to enforce the summons in the United States District Court for the Western District of Michigan. The Magistrate to whom the matter was referred recommended enforcement of the summons.

The Magistrate rejected Upjohn's claim of attorney-client privilege, concluding that the attorney-client privilege protects only communications made to counsel by members of Upjohn's "control group" and finding that the employees from whom Upjohn's attorneys had obtained the information at issue were not members of the "control group." 41 A.F.T.R.2d at 78-799 to 78-803.

The Magistrate rejected also Upjohn's work product objection. Concluding that the IRS had made a sufficient showing of need for the material sought by the summons, the Magistrate found it unnecessary to decide whether the work product doctrine was applicable in a summons enforcement proceeding.[2] 41 A.F.T.R.2d at 78-803 to 78-805.

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2 The Magistrate's opinion did not discuss whether the documents at issue were prepared in anticipation of litigation. This almost surely was so, however, in light of the extensive litigation spawned in recent years by questionable payments. *See generally* Block and Barton, *Administrative Proceedings to Enforce the Foreign Corrupt Practices Act*, 7 Sec. Reg. L. J. 40 (1979), and cases cited therein.

The District Court did not make a separate analysis of the issues, but simply adopted the opinion of the Magistrate in a brief order. 78-1 U.S.T.C. ¶ 9437. Upjohn appealed.

The Court of Appeals for the Sixth Circuit recognized that other courts, including the Seventh and Eighth Circuits, had adopted a broader rule—the "subject matter" test—than the one applied by the District Court in determining the scope of the attorney-client privilege with respect to communications with corporate personnel. The Court further acknowledged that under this "subject matter" test, communications made to counsel by corporate employees are privileged if, (a) the subject matter of the communications is a matter about which counsel has been requested to provide legal advice, (b) it involves the performance by the employees of their corporate duties, and (c) the employees' superiors directed them to communicate with counsel 600 F.2d at 1226-27.

The Court of Appeals nevertheless held that the narrower "control group" test was the proper standard. *Id.* The Court further held that, although the District Court had properly looked to the "control group" test to define the scope of the attorney-client privilege, it had misapplied the test. 600 F.2d at 1227-28. Consequently, the Court of Appeals remanded the case to the District Court for a redetermination of which of the employees from whom Upjohn's attorneys received communications were part of Upjohn's "control group." *Id.* at 1228.

With respect to the work product issue, the Sixth Circuit held in a cursory footnote that the work product doctrine was not applicable to administrative sum-

monses issued under 26 U.S.C. § 7602. *Id.* at 1228 n. 13.

INTEREST OF AMICI CURIAE

The scope of the attorney-client privilege as applied to corporations has an enormous impact both on the relationship between counsel and their corporate clients and on the administration of justice. The Committees submit that acceptance of the "control group" test adopted by the Court of Appeals in this case would substantially and adversely affect both those weighty interests.

The scope of the work product doctrine also is of great significance to the bar. The Committees submit that the result below, if affirmed, necessarily would have the very "demoralizing . . . effect" that the doctrine was designed to avoid.[3]

Petitioners and respondents naturally must focus on the particular facts of this case. The Committees' interest is more in emphasizing the broader significance of the questions raised and in presenting the policy considerations that, we submit, should be determinative of those issues.

SUMMARY OF ARGUMENT

The Court of Appeals perceived this case as presenting a conflict between the IRS's interest in discovering relevant information and society's interest in protecting the confidential relationship between a lawyer and his client. The Court regarded the attorney-

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3 *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947).

client privilege and the work product doctrine as obstacles to a determination of the truth and therefore limited each to the narrowest possible scope. We submit that the Court of Appeals' view is based on a fundamental misconception and led the Court to an improperly restrictive view of legal principles that serve important social interests.

The attorney-client privilege protects only communications between the lawyer and his client. It does not prevent the discovery of the underlying facts. Nor does the work product doctrine interfere with ascertaining the truth. An attorney's opinions and mental operations simply are not a proper subject of IRS interest, and factual work product material may be obtained on a proper showing of need. In this case, for example, nothing prevents the IRS from determining all of the relevant facts and circumstances concerning questionable payments by Upjohn. The IRS, either by voluntary means or otherwise, may interview Upjohn's employees and inspect Upjohn's business records. In consequence, there is little reason to restrict the attorney-client privilege and the work product doctrine as the Court below has done.

We do not here focus only on the weakness of the interests advanced by respondents, however. Nor do we dwell on the fact that the "control group" test (which finds no support in the entire history of the common law) was invented in *dictum* only eighteen years ago[4]

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4 *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). In that case, a defendant invoked the attorney-client privilege in response to interrogatories that

(*Footnote continued*)

and has been rejected both by the courts that have properly analyzed the issue[5] and by most of the commentators.[6]

(*Footnote continued*)

merely asked for certain relevant facts within the knowledge of the corporation. The District Court overruled the objection on the ground that the employees in question were not within the corporation's "control group." It cited no authority for so restricting the privilege and made no effort to justify the restriction on policy grounds. Moreover, because the interrogatories sought only the underlying facts, the Court's "control group" statement was gratuitous. No proper formulation of the attorney-client privilege protects against disclosure of relevant facts, as opposed to confidential communications.

5 *E.g.*, *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (*en banc*); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D. D.C. 1978); *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); *Xerox Corp.* v. *IBM Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974); *Sylgab Steel & Wire Corp.* v. *Imoco-Gateway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976); *Eutectic Corp.* v. *Metco, Inc.*, 61 F.R.D. 35 (E.D.N.Y. 1973); *Hasso* v. *Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973). It is noteworthy that the District Court for the Eastern District of Pennsylvania, the court which invented the "control group" test, is among the courts which, upon consideration, have rejected it.

6 *E.g.*, Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Lwyr. 901, 907-08 (1969); Heininger, *The Attorney-Client Privilege as It Relates to Corporations*, 53 Ill. B.J. 376, 384 (1965); Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 Ga.L.Rev. 339, 366-69 (1972); Maurer, *Privileged Communications and the Corporate Counsel*, 28 Ala. Lwyr. 352 (1967); Pye, *The Attorney-Corporate Client Privilege*, 15 Prac. Lwyr. 15 (1969); Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. Indus. & Com. L. Rev. 873, 875-77 (1971); Note, *Corporate Attorney-Client Privilege: Diversified Industries, Inc. v. Meredith—The Modified Harper & Row Test*, 4 J. Corp. Law 226 (1978); Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 So. Calif. L. Rev. 303, 311-12 (1977); Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 Cath.

(*Footnote continued*)

What we do emphasize is that the "control group" test and the Court of Appeals' restrictive view of the work product doctrine, if adopted by this Court, would seriously compromise important public policies. Those public policies would be affected adversely because their implementation necessarily relies heavily upon the existence of an effective private bar possessing the trust of its corporate clients, the freedom to seek and record pertinent information, and the ability to perform its tasks uninhibited by the threat of forced disclosure. Were the bar yoked with the view adopted by the courts below, then that trust would be compromised and the bar would be unable adequately to perform this valuable public function.

(*Footnote continued*)

Lwyr. 138, 146-50 (1976); Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 Syr. L. Rev. 759, 761-62 (1971); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 373-74 (1970); Comment, *Attorney-Client Privilege—Diversified Industries, Inc. v. Meredith: New Rules for Applying the Privilege When the Client Is a Corporation*, 57 No. Car. L. Rev. 306 (1979); Comment, 47 Geo. Wash. L. Rev. 413 (1979); Comment, 28 Drake L. Rev. 191 (1978); Comment, 31 Vand. L. Rev. 667 (1978); Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 Ford. L. Rev. 281, 291 (1970).

ARGUMENT

I.

THE "SUBJECT MATTER" TEST BEST SERVES THE PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE AND THE INTERESTS OF SOCIETY.

A. The "Control Group" Test Would Impair the Important Role of Corporate Counsel in Securing Responsible Corporate Action.

This Court repeatedly has recognized that the attorney-client privilege is a bulwark in the proper administration of justice.

Over one hundred years ago, this Court emphasized that:

> "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876).

A decade later, this Court stated that the attorney-client privilege:

> ". . . is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which

> assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

Again, in 1915, this Court wrote:

> "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R. R.*, 236 U.S. 318, 336 (1915).

More recently, Mr. Justice White wrote for the Court:

> "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. . . . As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976).

This Court never has suggested that the salutary purposes of the attorney-client privilege are any less important when the client is a corporation than when it is a private individual. Indeed, the *Louisville & Nashville* case, *supra*, 236 U.S. 318, quoted above, involved a communication between a corporate client

and its lawyer. There is more reason today than ever before fully to protect communications between corporate personnel and corporate counsel.

First of all, today it is corporate clients, more often than individuals, who regularly call upon counsel for advice concerning how to comply with the law.[7] As Judge Medina has remarked:

> "Since [the] early statements [of the purposes of the privilege], the necessity of protecting the attorney-client relationship has become even more apparent; the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients." *A.B. Dick Co.* v. *Marr*, 95 F. Supp. 83, 102 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).

This, of course, will come as no surprise to this Court, intimately familiar as it is with the maze of complex statutes and regulations that govern the modern corporation's every action.

Second, society today relies heavily upon the private bar to provide the frank advice necessary to steer corporate conduct in the proper direction. As Simon H. Rifkind has said:

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7 "[I]ndividuals go to lawyers when they are in trouble with the police, or are sued, or themselves want to bring a lawsuit. . . . Corporations, however . . . constantly go to lawyers to find out how to obey the law." Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Lwyr. 901, 913 (1969).

"[A] very large area of regulation by law would today be impossible of enforcement were it not for the services of a highly sophisticated, well-informed and highly-principled Bar . . . .

"To be specific, I refer, first, to the Internal Revenue laws; secondly, to the Anti-Trust laws and, third, to the Securities and Investment laws, as examples. There are many more.[8] And I suggest that for every police action taken by agencies of the government in these fields, either to prevent or punish infractions, there are a thousand preventive steps which are taken at the instance of, on the advice of, and under the supervision of private lawyers.

"The reason is simple enough. Compliance with these laws and these regulations is not the mere activation of the 'do right' ethics that businessmen have learned at their mothers' knees. Nothing in the moral code learned at home teaches a business executive what reports he should file with the SEC, what deductions he may take in his tax return, what and when to disclose to the public about his corporate affairs, when to exercise control in management and when to abstain, what is permissible to say to a competitor and what is forbidden. If the police confined their activities to the enforcement of these regulations alone and abandoned all other forms of law enforcement, there would not be enough of them without the Bar." Rifkind, *Access to Client and Adversary—A Plea*, 22 Record of the Association of the Bar of the City of New York 566, 567-68 (1967).

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8 For example, the federal equal employment laws and other labor laws, the Occupational Safety and Health Act, the Clean Air Act and other environmental legislation, and fair trade practice laws and rules. As to each of these, corporate counsel plays a critical role in compliance programs.

Other commentators,[9] as well as senior enforcement officials[10] and the courts,[11] have recognized this link between a healthy attorney-corporate client relationship and the effective enforcement of these complicated but important federal laws.

In order for counsel to exercise their salutary influence on corporate conduct, they must have access to all relevant facts and the trust and confidence of their client and its personnel. As Judge Hemphill has said:

> "This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients. Unless

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9 *E.g.*, Burnham, *supra*, 24 Bus. Lwyr. at 913-14.

10 *E.g.*, Securities and Exchange Comm'n, *Report on Questionable and Illegal Corporate Payments and Practices* 67-68 (May 12, 1976); Address by Harold M. Williams, Chairman, Securities and Exchange Comm'n, *The Role of Inside Counsel in Corporate Accountability*, Seventeenth Annual Corporate Counsel Institute (Oct. 4, 1979), *reprinted in* 196 *Daily Report for Executives* (BNA) at B-1 (Oct. 10, 1979); Address by Harold M. Williams, Chairman, Securities and Exchange Comm'n, *Corporate Accountability*, Fifth Annual Securities Regulation Institute (Jan. 18, 1978); Address by Stanley Sporkin, Director, Division of Enforcement, Securities and Exchange Comm'n, Stamford, Conn. Area Commerce and Industry Ass'n Forum (Mar. 15, 1977); Address by Stanley Sporkin, Director, Division of Enforcement, Securities and Exchange Comm'n, New York County Lawyers Ass'n (April 7, 1976).

11 *E.g.*, *SEC* v. *Spectrum, Ltd.*, 489 F.2d 535, 536 (2d Cir. 1973) (Kaufman, C.J.) ("The securities laws provide a myriad of safeguards designed to protect the interests of the investing public. Effective implementation of these safeguards, however, depends in large measure on the members of the bar who serve in an advisory capacity to those engaged in securities transactions.")

> corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected." *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164-65 (D.S.C. 1974).[12]

This critical link between the lawyer-corporate client relationship and the administration of justice would be severely damaged were the attorney-client privilege limited to communications between counsel and a limited corporate "control group."

Consider, for a moment, the consequences that a breach of confidence would have upon day-to-day counseling at the lower levels of corporate management. Those who encounter difficulties with the antitrust laws, for example, are usually middle or lower management personnel who are involved in the marketing process. Prudent corporate management will provide for extensive counseling of these personnel by corporate attorneys. Under the "control group" test, however, the attorney-client privilege might not apply to discussions by counsel with these people. It no longer would be prudent for a corporation to have its lawyers carefully and regularly gather facts and give advice about its operations. Such counseling might be fatal in some unanticipated lawsuit. Consequently, corporations might well decide to forego that communication.

If, despite that risk, a corporation decided to continue such counseling, the counseling necessarily would be a pale version of its former self. On the one

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12 *Accord*, Rifkind, *Access to Client and Adversary—A Plea*, 22 Record of the Association of the Bar of the City of New York 566, 568 (1967).

hand, the sophisticated lawyer would not wish to learn too much for fear that some day he would have to disclose that information to his adversary.[13] On the other hand, the corporate employee would be inclined to stumble warily along, trying to ask questions that would enlighten him as to the law, while at the same time concealing from the lawyer any evidence of what the employee guessed might be violations of the law.

If, despite these obstacles, the lawyer did learn something significant, that significant new information probably would not be put to good use. The lawyer would be most reluctant to communicate his judgments as to the uncertain legality of conduct for fear that the employee might some day be forced to repeat the lawyer's words to his adversary, or before a court. Should the legality of the corporate conduct raise questions the answers to which were not obvious—a situation not unusual in the practice of corporate, securities or antitrust law—counsel's position would be particularly awkward. In that event, counsel's advice might be influenced by the risk that, at some future date, he would be called upon to defend the client in litigation, and his advice would be made public. One commentator has presented an illustration graphically explaining the problems that would be created if an attorney could not give his corporate client confidential advice about such issues:

> "In his role as advisor the lawyer may tell his client that the proposed [conduct] raises several questions not

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13 Consequently, it is not even accurate to say that the "control group" test would make facts marginally more accessible to the opposing party. Rather, that test would likely mean that counsel would not gather those facts in the first place.

> heretofore resolved, and that there is a distinct likelihood that [it] could ultimately be held to violate a federal statute or perhaps a previously entered order or decree. The corporation may nonetheless decide to undertake the program, and this may be a perfectly proper decision. If the matter is subsequently litigated . . . the lawyer, as an advocate, will be responsible for presenting the strongest possible case for the legality of the contested arrangement. But what of his prior advice? If not privileged it may be admissible evidence against the client, bearing on his state of mind or knowledge. Even if not admissible it may come to the attention of the [adversary, or the court, or the administrative] agency or its staff and influence [their] subsequent actions.
>
> "If the privilege is unavailable to his client the lawyer will be aware of these possibilities when he originally is called upon to render advice. What is he to do? His rendition of accurate but undesired advice will compromise the position that, as the advocate, he may be called upon to defend. In these circumstances it would be unrealistic to discount the likelihood that the advocate will prevail over the advisor. The resultant caution with which the lawyer advises his client may mislead the client into thinking his proposed action is lawful when in fact it is not, or may not be. It may induce him to undertake a program from which he would have been dissuaded had he been clearly warned of the legal dangers." Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L. Rev. 262, 269-270 (1963).

It is also possible that counsel will skew his advice in the other direction. Counsel may be concerned with the consequences to himself of advising his client that there is little or no risk of illegality. If counsel gives such advice and if the risk materializes, then counsel's advice

can be portrayed by his adversary as foolish or even negligent. For this reason, counsel may be overly cautious in advising his corporate client, and thereby dissuade the client from economically and socially desirable activity.

These hypotheticals illustrate the obvious: frank advice will be given only if the lawyer is confident that his advice will be kept confidential.[14] Indeed, identical considerations explain the strict rules of confidentiality which apply to executive and judicial deliberations.

For all these reasons, a crippled privilege itself would cripple the bar's ability to counsel and guide corporate clients so as to avoid illegal conduct. The quantity of counseling would no doubt decline significantly. The quality of advice also would be undermined—both because counsel would not have adequate access to the pertinent facts and because counsel would shrink from providing frank advice. The public policies behind many significant federal laws would be undercut.

To be sure, respondents are not advocating the total abolition of the attorney-client privilege, only the adoption of the "control group" test. The "control group" test would leave some communications between counsel and corporate personnel protected.

But which communications would that test protect? Each time an attorney is asked for advice by a corporate client, he would have to ask that question. He would have to inquire into the position, status, and responsibility of the employee in question. He would

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14 Corporations might well be unwilling or unable to conduct the sort of investigation that Upjohn undertook here if they and their employees knew that the government could obtain the product of counsel's inquiry.

have to make a judgment as to whether a court, at some unknown later date, would conclude that the particular employee was a proper party to the amorphous process of his client's corporate decision-making with respect to the particular issue at hand. The resulting unpredictability would make it difficult if not impossible to achieve the objectives that the privilege is designed to achieve in connection with serving corporate clients.

Many commentators have recognized that the uncertainty caused by the "control group" test is one of the test's most serious drawbacks. *E.g.*, Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 373 (1970) ("This approach has failed to produce any objective guides that can be used to predict who the courts will consider to be members of the control group"). On the other hand, it is undisputed that the so-called "subject matter" test of the privilege establishes a "bright line" which is easy of application.

The unpredictability of the "control group" test is a product of several factors. A principal source of its vagueness arises from the amorphous nature of modern corporate decision-making. It is generally recognized today that there is no one "control group" in a corporation that is responsible for acting upon the advice of counsel. Corporations today are more often characterized by decentralized decision-making, or by decisions made after a lengthy process of receiving input from a range of corporate personnel. Consequently, it is no easy exercise to identify the fictive "control group." [15]

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15 *E.g.*, Smiddy, *Deciding*, in Top Management Handbook 267-68 n.1 (H.B. Maynard ed. 1980) (" 'Top Management' is a frequently used

(*Footnote continued*)

These uncertainties must have an adverse effect on the quality of legal advice rendered to corporations. Imagine a lawyer, perhaps pressed on an emergency basis for his advice, first embarking upon the metaphysical analysis of "patterns of decision making"—both his client's and the industry's—to determine whether some court, perhaps years later, will deem a particular employee to have been a member of a "control group."

To state the problem is to show the unworkability of the standard: unless counsel is speaking to the board or the chief executive officer, he must assume that his communications may not be protected. And this means that for most purposes the "control group" test would abolish the corporate privilege.

The vagueness of the "control group" test is a powerful reason to reject it. The *raison d'etre* of the attorney-client privilege, after all, is that the privilege encourages communications "which might not have been made absent the privilege." *Fisher* v. *United States*, *supra*, 425 U.S. at 403. But such communica-

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(*Footnote continued*)

phrase, and yet the frequency of its use, with so many different meanings, seems to have created considerable ambiguity . . . . There is *some*—but often diverse—meaning in it for everyone; yet this tends to limit its usefulness for serious discussion where both precision and consistency are needed.") (Emphasis in original). *See also* D. McFarland, *Management: Principles and Practices* 262 (1974); *Modern Management, Issues and Ideas* (D. Hampton ed. 1975); H. Simon, *The New Science of Management Decision* 39-44 (1960); V. Vroom, *A New Look At Managerial Decision Making*, in Organizational Dynamics-AMACOM (Spring 1973); H. Stieglitz & A. Janger, *Top Management Organization in Divisionalized Companies*, Conference Board, Studies in Personnel Policy No. 195, 3-4 (1965); H. Uyterhoeven, *General Managers in the Middle*, 50 Harv. Bus. Rev. 75 (March-April 1972).

tions simply will not occur if neither counsel nor the client can be sure, at the time of the communication, that the communication will be protected. In short, in an area of the law where predictability is peculiarly essential—where an unpredictable test of a privilege is as bad as no privilege at all—the "control group" test does not pass muster.[16]

The perversity of the "control group" test is further reflected by the fact that, as a corporation's legal problem becomes more serious, corporate attorneys under that test would be less able to obtain pertinent information and less able to assist their clients in complying with the law. A major government antitrust suit, for example, may be of such importance to a corporation that its board of directors will reserve the making of all relevant decisions to itself.[17] If so, only those directors might be members of the "control group." In that event, the privilege would be of little or no benefit to the corporation, for it is unlikely that the directors would have any personal knowledge of the pertinent facts.[18] Similarly, the Magistrate and the

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16 Accordingly, one of the reasons this Court should, we submit, reject the "control group" test is presumably one of the principal reasons this Court granted *certiorari*. Just as the uncertainty created by a split in the Circuit Courts of Appeals concerning the scope of the privilege substantially undermines the function of the privilege, so the uncertainty which would be created by the "control group" test would have the same baleful consequences.

17 *See, e.g., N. Y. Times*, July 20, 1979, § 4, at 2, col. 5, reporting that IBM constituted a committee composed of selected members of its board of directors to decide what action, if any, to take with respect to a recusal motion in the Government's antitrust case against it.

18 This would also be a terribly inefficient development. A small, artificial "control group" would be inundated with matters better left to others.

District Court in the instant case denied protection to communications from the managers of Upjohn's foreign affiliates because the questionable payments problem which those communications concerned was "a matter of overwhelming importance to the Company. . . ." 41 A.F.T.R.2d at 78-802.

To withdraw the privilege when it is most needed is in effect to conclude that the privilege has no good purpose. Yet, as this Court has recognized, the privilege is a bulwark in the proper administration of justice. For it to remain that bulwark, the "control group" test should be rejected.

B. The "Control Group" Test is Based on an Artificial Effort to Personify the Corporation, an Effort that is Irrelevant to the Policies of the Privilege.

The seminal "control group" case, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962), explained the logic of the test as follows:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, *then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer* and the privilege would apply. In all other cases *the employee would be merely giving information to the lawyer to enable the latter to advise those in the*

> *corporation having the authority to act or refrain from acting on the advice.*" (Emphasis supplied).

This attempt to define the scope of the attorney-client privilege by personifying the corporation has remained to this day the rationale of the "control group" test.

The "personification approach" was followed by the Court of Appeals in this case. Thus, the court below wrote:

> "[C]orporations, unlike individuals, are organized in such a way that responsibilities, and the information needed to fulfill the responsibilities, are delegated and compartmentalized. Thus, marketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. *It is only the senior management*, guiding and integrating the several operations *which can be said to possess an identity analogous to the corporation as a whole.*" *United States* v. *Upjohn Co.*, 600 F.2d at 1226 (6th Cir. 1979) (Emphasis supplied).

The logic of this approach fails even on its own terms.

As one commentator has explained:

> "[T]he courts that have utilized this approach appear to have overlooked the fact that the individuals in a corporation can be divided into two functional groups for purposes of the attorney-client privilege: *decision makers* and *givers of information*. In the context of the personal attorney-client privilege, the individual client acts in both capacities—he gives information and then, based on the attorney's advice, he makes a decision—and any communication either to or from his attorney is privileged. The control group approach concentrates on

> only those employees in the corporation who are decision makers and completely ignores the fact that information must be given to the attorney before he can render legal advice. [The "control group" test consequently] provides an incomplete analogy to the individual privilege." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 Mich. L. Rev. 360, 374 (1970) (Emphasis in original).

More important, we submit, is the fact that the scope of the attorney-client privilege should not depend upon some metaphysical (and highly unpredictable) inquiry into who personifies a corporation. Rather, the proper scope of the privilege should be based upon an analysis of the function of the privilege.

The purpose of the attorney-client privilege is to ensure that frank and informed legal advice is sought and given in order that the client (be it individual or corporate) may conform his actions to the law. We respectfully submit that the decision of the courts below concerning the scope of the attorney-client privilege conflicts with this weighty purpose and, consequently, should be reversed.

II.

THE WORK PRODUCT DOCTRINE APPLIES TO THE ADMINISTRATIVE SUMMONS AT ISSUE HERE JUST AS IT APPLIES TO ANY COMPULSORY PROCESS.

In *Hickman* v. *Taylor*, 329 U.S. 495, 510-11 (1947), this Court recognized that the confidentiality of a lawyer's thoughts must be protected if the adversary system is to function.

The decision below—that the work product rule does not apply here because this is a proceeding in which the work product was sought by means of an administrative summons—is virtually unprecedented and is irreconcilable with the weighty policy considerations embodied in the *Hickman* decision. There is no hint in *Hickman* of any such exception, and there is no reason to create one now.

As this Court recognized in *Hickman*, a lawyer must have confidence that his thoughts will not become accessible to potential adversaries—no matter what proceedings those thoughts pertain to or what proceedings may be commenced in the future. If protection depends upon what type of a proceeding might someday be commenced, or upon the means by which work product might be demanded, then counsel will always labor with one eye over his shoulder. That is precisely the result which this Court has been at pains to avoid.

For these reasons, the courts have upheld the applicability of the work product rule in virtually every type of proceeding imaginable. Indeed, the courts have held that the work product rule is fully applicable, even in proceedings in which access to the facts is

particularly critical—such as criminal investigations and trials.

In *United States* v. *Nobles*, 422 U.S. 225, 238 (1975), for example, this Court held that the work product doctrine applied to a demand by the Government at a criminal trial for counsel's interview notes. The Court stated that the doctrine's "role in assuring the proper functioning of the criminal justice system is even more vital" than its role in civil proceedings. As it is now clear that the work product doctrine applies to both civil and criminal proceedings, surely there is no basis for any contention that it is inapplicable to a summons issued by an administrative agency.

It is noteworthy also that, as respondents conceded below, the summons at issue here is analogous to a grand jury subpoena. The same interests identified in Mr. Justice Jackson's opinion in *Hickman* v. *Taylor*, *supra*, have led each of the four United States Courts of Appeals that have considered the question to conclude that the work product doctrine is applicable to a grand jury subpoena. *See In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation*, 599 F.2d 1224 (3rd Cir. 1979); *In re Grand Jury Proceedings*, 604 F.2d 798 (3rd Cir. 1979); *Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973).

In short, because the policy considerations identified in *Hickman* v. *Taylor* so far outweigh the slight costs of the work product privilege, that doctrine shelters work product in all contexts—whether it is demanded in a civil action, a criminal case, or in an administrative proceeding and regardless of the procedural means used to demand the work product.

For these reasons, we respectfully submit that this Court should make clear that footnote 13 in the opinion below is in error.

CONCLUSION

For the policy reasons set forth above, both holdings of the decision below should be reversed.

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Respectfully submitted,

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